

STATE OF MICHIGAN
COURT OF APPEALS

YOGESCHANDRA B. PATEL, M.D.,

Plaintiff-Appellee/Cross-Appellant,

v

WYANDOTTE HOSPITAL AND MEDICAL
CENTER, INC., d/b/a HENRY FORD
WYANDOTTE HOSPITAL and DR. ANDREW
R. BARNOSKY,

Defendants-Appellants/Cross-
Appellees.

UNPUBLISHED

April 29, 2003

No. 230189

Wayne Circuit Court

LC No. 98-815347-CK

Before: O’Connell, P.J., and Fitzgerald and Murray, JJ.

O’CONNELL, J. (*concurring in part and dissenting in part*).

I concur with parts II and III of the majority opinion. However, I respectfully dissent from part I of the majority opinion. I conclude that the verdict was clearly against the great weight of the evidence. Assuming *arguendo* that plaintiff presented sufficient evidence to support a verdict of wrongful discharge on the basis of racial discrimination, I conclude that defendant has presented overwhelming evidence that the same decision would have been reached even in the absence of evidence of discrimination.

Because plaintiff provided direct evidence of discrimination, this case presents a question of mixed motives, one in which the decision to fire plaintiff could have been based on several factors – legitimate ones as well as legally impermissible ones. *Harrison v Olde Financial Corp*, 225 Mich App 601, 610; 572 NW2d 679 (1997). Thus, once plaintiff presented direct evidence of discrimination, defendant had the burden of establishing by a preponderance of the evidence that it would have reached the same decision without consideration of plaintiff’s protected status. *Id.* at 611. In other words, if the employer can show that the same decision would have been reached even in the absence of discrimination, no liability arises. *Id.*; see also *Wilcox v Minnesota Mining & Mfg Co*, 235 Mich App 347, 360-361; 597 NW2d 250 (1999).

In my opinion, plaintiff’s termination was justified because of his admitted violation of the hospital’s chaperone policy¹ and complaints of female patients of plaintiff’s impropriety

¹ On numerous occasions plaintiff was instructed that he was not to perform pelvic or breast
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during examinations conducted without a chaperone. To allow plaintiff to remain on staff as an emergency room physician is contrary to professional standards and places defendant hospital in an untenable position. Thus, in my view, the trial court erred when it failed to grant the motion for judgment notwithstanding the verdict (JNOV). See *Phinney v Verbrugge*, 222 Mich App 513, 524-525; 564 NW2d 532 (1997).

Plaintiff, an emergency room physician, was terminated after an internal investigation revealed that plaintiff failed to comply with the hospital's policy of having either a registered nurse or other appropriate chaperone present when performing breast and pelvic examinations. This policy was explained to plaintiff and memorialized in an October 3, 1995, memorandum that was placed in plaintiff's file after a complaint had been registered against plaintiff for performing an improper act during the course of a pelvic examination.²

On April 20, 1996, another complaint was filed by a patient who was treated by plaintiff when she sought treatment in the emergency room for chest pains and shortness of breath. The written complaint stated in part:

Dr. Patel pulled my gown down to my waist, fully exposed my breasts and listened to my chest. He then began to feel and massage my breasts and rub, squeeze and pinch my nipples. Pt asked Dr. Patel "What are you doing, shouldn't a nurse be in here too? Pt states "I've never had a breast exam like this." States "I never had a problem with my breasts." "I then felt something wet on my nipples and asked Dr. Patel what's going on." Dr. Patel informed pt that she had white d/c from her nipples. Pt states "I never had a problem with my breasts and nipples before this." "Anybody would have d/c from their nipples if they were pinched pulled and manipulated this much." Dr. Patel told her "maybe it's hormonal, are you sexually active?" Pt told Dr. Patel "yes." Dr. Patel then asked her if she had a boyfriend. He then asked her if she had abdominal pain. Pt told him "no, not now." Dr. Patel asked her if she ever had abdominal pain and the pt said "well, yes, hasn't everybody had abdominal pain before." Dr. Patel then told the pt to lay back to let him palpate her abdomen. He then began palpating her abdomen. Pt reports saying several times to Dr. Patel "shouldn't a nurse be in here with us." Pt states she placed her hand over her pubic area to "guard" herself. Pt reports feeling "very uncomfortable about this exam." Dr. Patel had his hand under her gown palpating her lower abdomen and told her to move her hand, which she refused. He then reported he felt a lump at the lower abdomen area and told her "I need to see inside." The pt asked, "what do you mean?" She then noticed that he had put a rubber glove on one hand and could feel fingers between legs. Pt says she told Dr. Patel, "no way, I don't need a pelvic exam, I

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examinations on female patients unless a female nurse or other appropriate chaperone was present in the examining room.

² Pursuant to plaintiff's contract he was required to apply for medical staff privileges every two years. In 1996, he was granted only a conditional reappointment, rather than a standard two-year appointment. The conditional reappointment was related to plaintiff's interpersonal skills and patient complaints lodged against him.

came here for my breathing.” “Shouldn’t a nurse be here for this, anyways.” She reports Dr. Patel proceeded to ask 3 times to do a pelvic exam which pt kept refusing.

After this complaint was filed, hospital officials met with plaintiff, who denied any impropriety but admitted there was no female chaperone in the ear, nose, and throat room when he examined the patient.³ Hospital officials placed plaintiff on administrative leave and commenced an investigation. The investigation determined that plaintiff had fifty-five emergency room files that showed inconsistencies between diagnosis and treatment. Plaintiff was also found to have performed more pelvic examinations than other physicians when presented with similar patient information. The investigation further showed that plaintiff’s treatment of patients was often inconsistent with the nursing notes and laboratory results contained in the files.

After completion of the investigation, a meeting of hospital personnel was held, during which a decision was made to terminate plaintiff’s employment. Again, plaintiff was terminated because he performed unnecessary and inappropriate pelvic and breast examinations and because he failed to have a chaperone present during these examinations as required by hospital policy.

In my opinion, defendant presented sufficient nondiscriminatory reasons to discharge plaintiff; therefore, the trial court erred in failing to grant the motion for JNOV. See *Harrison, supra*.

/s/ Peter D. O’Connell

³ Hospital records revealed that emergency examination rooms were available but plaintiff went across the hall to use the ear, nose, and throat room without a chaperone.